Office-Supreme Court, U.S.
FILED
OCT 20 1983
ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982
No. 82-2139

CHARLES B. ARMSTRONG, JR.,

Petitioner,

v.

ELAYNE A. ARMSTRONG,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

At the outset, petitioner must correct the citation error which appears on page 2 of the petition. Jurisdiction of this Court is sought pursuant to 28 U.S.C. § 1254(1), not 28 U.S.C. § 1257(3).

Respondent Elayne Armstrong's brief in opposition does not join issue with the principal points raised in the petition for certiorari. Mrs. Armstrong's brief does not discuss at all the first question upon which petitioner has requested this Court to grant certiorari, namely the Ninth Circuit's misapplication of this Court's decision in Skelly v. Phillips Petroleum Co., 339 U.S. 667, 673-674 (1950). (See Pet., pp. 18-27.) This misapplication of Skelly was the very essence of the Ninth Circuit decision which petitioner asks this Court to review, and the

lack of a response on this issue is tantamount to a concession of this point by Mrs. Armstrong. This brief will demonstrate that none of the points raised in the brief in opposition have merit as considerations in opposition to certiorari.

ARGUMENT

I

THE DISTRICT COURT DID NOT LACK JURISDICTION BECAUSE THIS CASE HAS AN IMPACT ON A STATE COURT DOMESTIC RELATIONS JUDGMENT

The first argument raised by Mrs. Armstrong in the Brief in Opposition is an argument that neither the Ninth Circuit nor the district court accepted in ruling in her favor below. Relying on Barber v. Barber, 21 How. 582 (1858) and its progeny, Mrs. Armstrong argues that the district court had no jurisdiction whatsoever with respect to domestic relations cases. (Br. in Opp., pp. 8-10.)

This argument is considerably wide of its mark. The Barber line of cases only applies to diversity cases where the plaintiff seeks to have a federal court grant a divorce, make a child custody order, or otherwise perform the traditional duties of a family court. See, e.g. Jagiella v. Jagiella, 647 F.2d 561, 564 and authorities cited in n. 11 (5th Cir. 1981).

This Court's recent decision in

Ridgway v. Ridgway, 454 U.S. 46 (1981), makes it clear why a federal district court has jurisdiction over a claim such as that presented in Colonel Armstrong's complaint. Ridgway states:

> "Notwithstanding the limited application of federal law in the field of domestic relations generally [citations], this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights. . . . And specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. [Citations.] That principle is but the consequence of the Supremacy Clause of our national Constitution." 102 S.Ct. at 54-55.

On the face of the complaint (Pet., pp. A-5 - A-10), it is clear that this case comes within the principle of enforcing

federal rights under the Supremacy Clause against the operation of state law so as to prevent the frustration and erosion of congressional policy embodied in the federal military retirement statutes. Thus, Mrs. Armstrong's first argument in the Brief in Opposition is without merit and misleading. A moment's reflection will indicate that cases such as Ridgway v. Ridgway, supra, and McCarty v. McCarty, 453 U.S. 210 (1981), would never have been decided if the Barber rule absolutely forbade any consideration of a federal issue arising in the domestic relations context.

II

THE CALIFORNIA AUTHORITY CITED BY MRS. ARMSTRONG DOES NOT SHOW THAT A CALIFORNIA COURT HAD JURISDICTION TO TREAT MILITARY RETIRED PAY AS PROPERTY IN 1973

In her Brief in Opposition, Mrs. Armstrong asserts when Colonel Armstrong argues that the 1973 interlocutory judgment is not entitled to res judicata effect with respect to after-acquired property that "Petitioner grossly misstates the California law at the time of the Interlocutory Judgment." (Br. in Opp., p. 11.) Mrs. Armstrong does not discuss any of the authorities cited in the petition. (See Pet., pp. 8-15.) In making her assertion, Mrs. Armstrong overlooks the fundamental

point made by her former husband in the petition for certiorari, to wit: that federal law, not California law, controlled the question of whether there was "property" over which the California superior court had jurisdiction to act in 1973. (Pet., pp. 8-11.)

Mrs. Armstrong does not dispute the proposition that the question of "property" rights in military retired pay was a question of federal law arising under 10 U.S.C. §§ 6321 et seq. in 1973, just as it is today. The fact that a California Court of Appeal had decided, without any consideration of federal law, that military retired pay could be divided as community property [see Bensing v. Bensing, 25 Cal.App.3d 889 (1972)] is not dispositive of the federal question of whether Colonel Armstrong's retired pay was "property" under the federal law which created whatever "property interests" there were in such pay.

Although Mrs. Armstrong's brief accuses petitioner of "grossly misstating California law at the time of the Interlocutory Judgment" (Br. in Op., p. 11), her brief does not tell the whole story. In 1973, the settled California law as reflected in the decisions of the California Supreme Court was that a California court could not

divide military retired pay as community property unless the military officer or enlisted man had already retired and his rights had already vested. In French v. French, 17 Cal.2d 775, 778 (1941), the California Supreme Court held that the California courts could not divide future rights to Fleet Reserve retirement as community property. The Court there stated:

> ". . . under the applicable statutes the appellant will not be entitled to such pay [Fleet Reserve retired pay] until he completes service of fourteen years in the Fleet Reserve and complies with all of the requirements of that service. At the present time, his right to retirement pay is an expectancy which is not subject to division as community property." Id. at 778.

The French case clearly recognized that a military person's right to retired pay was a mere "expectancy" prior to that person's actual retirement. It was not until In re Marriage of Brown, 15 Cal.3d 838 (1976), that the California Supreme Court overruled French v. French and held for the first time that non-vested, contingent rights to retired pay ("mere expectancies") could be

divided as community property.

III

COLONEL ARMSTRONG'S CLAIM WAS NOT BARRED BY THE DOCTRINE OF RES JUDICATA

Mrs. Armstrong contends that Colonel Armstrong's federal challenge to the 1973 judgment is barred by the doctrine of res judicata. (Br. in Opp., pp. 15-18.) The basic reason why the doctrine of res judicata does not apply is that a void judgment has no res judicata effect. Enforcement of a void judgment may be enjoined or collaterally attacked at any time in any proceeding, state or federal, in which the effect of the judgment comes in issue. (See Pet., pp. 20-21.) There is no requirement that a challenge to a judgment which void for lack of subject matter jurisdiction must be raised in the original proceedings which led to the judgment which is challenged. Indeed, if this were the requirement, then no case involving subsequent direct and collateral attack on a void judgment would ever be possible. Both as a matter of logic and of law, res judicata does not preclude a void judgment attack when the challenge to subject matter jurisdiction has not been raised or decided in a prior proceeding.

IV

DISMISSAL OF THE COMPLAINT IN THIS CASE WAS NOT A PROPER EXERCISE OF DISCRETION UNDER THE FEDERAL DECLARATORY JUDGMENT ACT; NOR WAS THE ANTI-INJUNCTION ACT A PROPER BASIS FOR THE DISMISSAL

Mrs. Armstrong's brief asserts that dismissal was a proper exercise of the discretion conferred on the district court by Federal Declaratory Judgment Act. (Br. in Op., pp. 21-22.) Controlling precedent, however, teaches that a district court cannot decline to entertain a declaratory relief action as a matter of whim or personal disinclination. Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 112 (1962). The issues which petitioner raised in his complaint necessarily called for the federal expertise of a federal judge familiar with federal law. The basic reason for the existence of federal courts is permit litigants to have their federal rights adjudicated in a sympathetic federal forum. If a federal district judge can decline to entertain a case which involves a true federal question, the remedy of federal declaratory relief becomes ephemeral.

With respect to the Anti-Injunction Act (28 U.S.C. § 2283), the injunctive relief sought in this case was sought for the purpose of effectuating the declaratory judgment which petitioner sought. As such,

the injunctive relief fell within an expressly authorized exception of the Act. Moreover, even if injunctive relief had been inappropriate, dismissal would not be appropriate without the court's giving independent consideration to declaratory relief. 6A Moore's Federal Practice, ¶ 57.08[2], at 57-40 and cases cited in footnote 21.

V

THE NEW UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT HAS NO EFFECT ON THIS CASE

In September of 1982, President Reagan signed into law the Uniformed Services Former Spouses' Protection Act [hereinafter Former Spouses Act], which was a rider to the Department of Defense Authorization Act of 1983 (S. 2248). The new Act became effective February 1, 1983. Since the primary thrust of the present case is to obtain a declaration that the 1973 interlocutory judgment was void and had no res judicata effect insofar as it purported to divided Colonel Armstrong's future retired pay, the Former Spouses Act should have no application to these questions. The validity of the 1973 California judgment can only be determined under the law which was in existence at the time that judgment was rendered. There is no language in the Former Spouses Act remotely suggesting that Congress

has intended to change the law applicable to judgments obtained prior to June 26, 1981. The manifest intent of Congress is that this new legislation apply prospectively from June 26, 1981, forward.

As this Court recently observed in United States v. Johnson, ___ U.S. ___, 102 S.Ct. 2579, 2586 (1982), a legislature makes its new rules wholly or partially retroactive or only prospective as it deems wise. Here the Congress has opted for limited retroactivity by applying the legislation forward from June 25, 1981. As to all cases prior to June 26, 1981, the new statute is intended to have no effect whatsoever, except that prior judgments may now be collected through military and naval finance offices.

CONCLUSION

For the foregoing reasons, petitioner urges that this petition be granted and that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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